

Congress of the United States
Washington, DC 20515-0545

March 9, 2020

The Honorable Lloyd Austin
Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301

Dear Secretary Austin,

We write in regards to the proposed Department of Defense (DoD) rule on overseas military contractors published in the Federal Register on January 7, 2021.¹ Unlike other military personnel, DoD contractors have no responsibility to report gross violations of human rights (GVHR) unless it is directly stipulated in their contracts.² Collecting accurate information is essential to preventing U.S. military aid from going to units and individuals credibly implicated in human rights violations, and to holding accountable the perpetrators of such crimes. Accordingly, Congress directed DoD to update contractor reporting requirements in 2019.³ It is our understanding that has not happened, and that nothing in this rule would create a so-called “duty to report” for contractors outside the United States. In keeping with President Biden’s directive for agency leaders to review all pending rules, we ask that you revise this rule to include a requirement that all DoD contracts performed outside the United States include a “duty to report” GVHR, as well as protections from retaliation for personnel who do so.⁴

Under the Leahy Law, the United States may not provide assistance to units of foreign security forces facing credible allegations of GVHR.⁵ The United States considers GVHR to include torture, extrajudicial killing, enforced disappearance, and rape under color of law.⁶ Before foreign military units can receive U.S. assistance, they are vetted by the State Department to ensure that

¹ Department of Defense, “Operational Contract Support (OCS) Outside the United States,” 86 FR 1063 (proposed January 7, 2021) (to be codified at 32 CFR Part 158), retrieved at: <https://www.govinfo.gov/content/pkg/FR-2021-01-07/pdf/2020-27694.pdf>.

² Department of Defense, “DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning” (DoD Directive 3115.09), updated October 29, 2020, Retrieved at: https://fas.org/irp/doddir/dod/d3115_09.pdf

³ Section 888, FY20 NDAA.

⁴ The White House, “Memorandum for the Heads of Executive Departments and Agencies; Regulatory Freeze Pending Review,” January 20, 2021, retrieved at: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/regulatory-freeze-pending-review/>.

⁵ The term “Leahy Law” refers to two separate laws, one covering assistance from the State Department (Section 620M of the Foreign Assistance Act of 1961), and one covering assistance from DoD (10 U.S. Code § 2249e).

⁶ Department of State, Bureau of Democracy, Human Rights, and Labor, “Fact Sheet: About the Leahy Law,” January 20, 2021, retrieved at: <https://www.state.gov/key-topics-bureau-of-democracy-human-rights-and-labor/human-rights/leahy-law-fact-sheet/>.

there are no credible allegations of GVHR. The State Department uses a variety of open-source and classified information to determine whether allegations are credible, including the source of allegations, documented patterns of abuse by the units in question, and the availability of corroborating reports.⁷ U.S. service members have an obligation to report suspected GVHR to their chain of command, which DoD in-turn provides to the State Department.

In 2015, 93 Members of Congress requested an investigation into Leahy Law implementation after allegations of child sexual abuse by partner forces in Afghanistan.⁸ A subsequent investigation by the Special Inspector General for Afghanistan Reconstruction (SIGAR) found that DoD had no policies in place for collecting reports of child sexual abuse, and little certainty about the extent of GVHR by Afghan troops.⁹ SIGAR's recommendations included additional guidance for all DoD personnel, and a specific reporting requirement for contractors.¹⁰ In support of this recommendation, SIGAR noted that contractors outnumbered uniformed personnel three-to-one. That ratio is now seventeen-to-one.¹¹

Since then, contractors have also been implicated in GVHR in Yemen. In response to allegations of torture and enforced disappearance by U.S.-aligned, Emirati-backed forces in 2018, Congress mandated a DoD review to ensure that all applicable U.S. laws were being followed.^{12, 13} In the ensuing report, DoD wrote (emphasis added): "Based on information *gathered* at this time, DoD has determined that DoD personnel have neither *observed*, nor been complicit in, any cruel, inhuman, or degrading treatment of detainees in Yemen."¹⁴ However, DoD Directive on interrogations states, contractors only have a duty to report GVHR "to the extent incorporated in their contracts."¹⁵ The onus falls on DoD to "gather" this information, which seemingly is not credible unless it is "observed." Such sleight of hand led one expert to conclude DoD's report

⁷ Ibid.

⁸ "After Congress Pushes, Pentagon Expands Look at Alleged Afghan Child Abuse," Paul McLeary, Foreign Policy, February 22, 2016, retrieved at: <https://foreignpolicy.com/2016/02/22/after-congress-pushes-pentagon-expands-look-at-alleged-afghan-child-abuse/>.

⁹ Special Inspector General for Afghanistan Reconstruction, "Child Sexual Assault in Afghanistan: Implementation of the Leahy Laws and Reports of Assault by Afghan Security Forces" (SIGAR 17-47-IP), published January 18, 2018, retrieved at: <https://www.sigar.mil/pdf/inspections/SIGAR%2017-47-IP.pdf>.

¹⁰ Ibid.

¹¹ "Troop levels are down, but US says over 18,000 contractors remain in Afghanistan," J.P. Lawrence, Stars and Stripes, January 19, 2021, retrieved at: <https://www.stripes.com/news/middle-east/troop-levels-are-down-but-us-says-over-18-000-contractors-remain-in-afghanistan-1.659040>.

¹² Amnesty International, "Disappearances and torture in southern Yemen detention facilities must be investigated as war crimes," July 12, 2018, retrieved at: <https://www.amnesty.org/en/latest/news/2018/07/disappearances-and-torture-in-southern-yemen-detention-facilities-must-be-investigated-as-war-crimes/>.

¹³ Section 1274, FY19 NDAA.

¹⁴ Department of Defense, Report to Congress on Detainee Abuse, January 7, 2019, retrieved at: <https://www.documentcloud.org/documents/5676973-Congress-Yemen-Report.html#document/p1>.

¹⁵ DoD Directive on DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning, Op. Cit.

could “only be described as a deliberately misleading and deceptively evasive account of U.S. and Emirati actions in Yemen that amounts to the ultimate non-denial denial.”¹⁶

In response, Congress passed Section 888 of the FY20 NDAA, which required DoD to update policies and contracting rules “to provide specific guidance to [DoD] employees and contractors...on monitoring and reporting allegations of gross violations of internationally recognized human rights.”¹⁷ The provision also required a report to Congress within 180 days, to include a summary of existing policies and procedures, and the resources needed by DoD to facilitate increased reporting from contractor personnel.¹⁸ It is our understanding that DoD did not update GVHR reporting requirements pursuant to this section, and that the required report is still incomplete, more than eight months after it was due to Congress.

The United States should not provide funding to, or otherwise align with, units of foreign security forces that have engaged in torture, extrajudicial killing, enforced disappearance, or rape under color of law, and it should take every precaution to avoid doing so. These atrocities are contrary to our values as a country and against the laws of war. Even short of war crimes or GVHR, abuses by foreign security services undermine the legitimacy of their governments and drive the victims to join insurgent groups.¹⁹ Accurate, complete information about potential GVHR is thus vital to DoD’s mission and U.S. national security. Collecting this information is impossible without the cooperation of the contractors who are an increasingly significant part of the U.S. military presence around the world, and already outnumber troops under Central Command by a ratio of 1.5 to 1.^{20,}
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DoD did take an important step last year by issuing Directive 2311.01 on the DoD Law of War Program, stating a clear requirement for contractors to report violations of the laws of war.²² However, this directive was ambiguous about the relationship between the laws of war and GVHR, as well as the relationship between foreign security forces and contractors. These are critical distinctions, including with respect to implementation of the Leahy Law, and should be clearly

¹⁶ “Annotation of the Pentagon Report to Congress on Detainee Abuse by U.S. Partners in Yemen,” Luke Hartig, Just Security, January 8, 2019, retrieved at: <https://www.justsecurity.org/62162/annotation-pentagon-report-congress-detainee-abuse-u-s-partners-yemen/>.

¹⁷ Section 888, FY20 NDAA, op. cit.

¹⁸ Ibid.

¹⁹ UN Development Programme, “Journey to Extremism in Africa: Drivers, Incentives, and the Tipping Point for Recruitment,” 2017, retrieved at: <http://journey-to-extremism.undp.org/content/downloads/UNDP-JourneyToExtremism-report-2017-english.pdf>.

²⁰ “US Military Reveals Contractors Flew to the Rescue in Niger, but Little Else,” Joseph Trevithick, The Warzone, October 13, 2017, retrieved at: <https://www.thedrive.com/the-war-zone/15121/us-military-reveals-contractors-flew-to-the-rescue-in-niger-but-little-else>.

²¹ Center for Strategic and International Studies, “U.S. Military Forces in FY 2020: SOF, Civilians, Contractors, and Nukes,” October 24, 2019, retrieved at: <https://www.csis.org/analysis/us-military-forces-fy-2020-sof-civilians-contractors-and-nukes>

²² Department of Defense, “DoD Law of War Program” (DoD Directive 2311.01), effective July 2, 2020, retrieved at: <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/231101p.pdf?ver=2020-07-02-143157-007>.

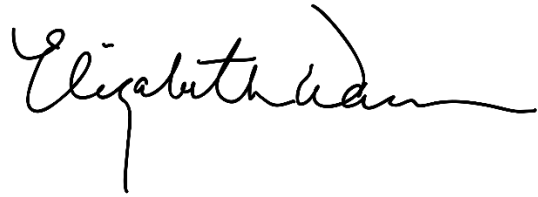
articulated to DoD personnel and contractors alike. We therefore request that you review the pending rule and ensure that the final rule makes clear that contracts must include a “duty-to-report” GVHR for overseas contractor personnel, as well as protections from retaliation for those who do.

We thank you for your attention to this important matter.

Sincerely,



Katie Porter
UNITED STATES REPRESENTATIVE



Elizabeth Warren
UNITED STATES SENATOR



Jason Crow
UNITED STATES REPRESENTATIVE



Patrick Leahy
UNITED STATES SENATOR